No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AIR LINE PILOTS ASSOCIATION,
Petitioner,

v.

ROBERT A. MILLER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

JERRY D. ANKER
(Counsel of Record)
CLAY WARNER
Air Line Pilots Association
Legal Department
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 797-4087

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. When nonunion employees wish to challenge the agency fee they are required to pay under an agency-shop agreement, must they exhaust the "impartial decisionmaker" procedure mandated by this Court's decision in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986) before bringing their claim to court?

2. After an "impartial decisionmaker" has held a full evidentiary hearing and issued a decision concerning the calculation of an agency fee, should a court that is subsequently presented with a challenge to that calculation accept the decisionmaker's findings of fact if they are not clearly erroneous, and determine *de novo* only the issues of law that are presented?

3. In the absence of any claim of fraud or willful misconduct, should a court accept an audit performed by a reputable national accounting firm as satisfying the requirement that a union's agency-fee disclosure statement be "verifi[ed] by an independent auditor," *Hudson*, 475 U.S. at 307 n.18, notwithstanding allegations by nonunion employees that the audit was not properly conducted?

4. When government regulation directly impacts matters that are within the scope of a union's collective bargaining responsibilities (in this case, on-the-job safety of airline pilots), is union advocacy with respect to such regulation an activity that is "germane to collective bargaining," the costs of which are properly chargeable to nonmember employees who are subject to an agency-shop agreement?

LIST OF PARTIES

The parties before the Court are the same as the parties in the court below. They are:

Petitioner (appellee below)

Air Line Pilots Association

Respondents (appellants below)

Ted M. Abbott
Neal E. Alberts
Clarence A. Anderson
J. Eric Anderson
J.L. Armstrong
Donald E. Asay
David J. Baccitich
Gerda H. Baitis as representative for the deceased Walter W. Baitis
R.B. Barnes
David Bauer
Alan G. Blake
Dale N. Boschetto
Richard A. Breems
David L. Brinton
John C. Brittenhaus
Robert Brushwyler
Jerald C. Burgess
G.D. Burson
Cornelius J. Carney
Alvin W. Chamberlain
Maurice Cloutier
Ramond Dale Compton
Peyton H. Cook, Jr.
William S. Cook
Marcus Covington, Jr.
James J. Crayton
Frederick T. Darvill
Gale Charles Davis
Charles P. Dawsen
Brian Decker
Timothy L. Dermer
Joseph H. DeVelis
W. David Doiron
James V. Dunlap
John D. Durris
James S. Ehmer
Joseph M. Elder
Jerry D. Elmore
Bruce E. Elmquist
Robert D. Engel
William T. Erwin
George W. Etter
James T. Ferguson
Roger Ferris

Ferdinand Fletcher
Neil B. Fossum
G.R. Fow
Don L. Fowler
R. Dell Fuller
Alan L. Gaines
Gary Gebo
James A. Gibbons
Patrick M. Glazier
Richard D. Grantham
Nicholas Gravino
Dennis E. Greulich
Gary Guilliat
John F. Gulledge
George S. Haines
Michael T. Hannan
Barry W. Harman
George L. Harmon
Douglas R. Harper
John C. Harrison
James C. Harwood
Harvey L. Hayden
George Hector
John Hemminger
L.R. Hern
Robert W. Hobbs
Harry F. Houdeshel
Willard F. Ice
Lester H. Ideker, Jr.
Dominic M. Insogna
John P. Jenkins
Peter G. Just
Robert Kane
Arthur L. Knowles
Gordon B. Kuntz
Edouard W. Lacroix, Jr.
Dominic Lemma
John L. Lynch
Leslie C. Long
Robert G. Lyon, Jr.
Donald D. MacEachern
Peter E. Martin
Donald E. Massey
Jack B. McBride
Joe C. McDole
William A. McGaw
Michael D. McGibney
Gary R. McHargue
Dane W. McNeil
Charles R. Miller
Dale E. Miller
Robert A. Miller
Einar J. Mogensen
Ronald A. Morin
C. Richard Morrow
Robert M. O'Brien, Jr.
Winthrop B. Orgera
Keith E. Parker
Paul E. Paulsen
Dale F. Peel

Joseph A. Peterman
Larry W. Peterson
William W. Peterson
Patrick A. Pettyjohn
James R. Pittman
Thomas J. Prosch
George S. Pupich
John C. Rector
Terril J. Richardson
Charles E. Robinson
Gordon G. Rogers
Lenard A. Rogers
Allan H. Roy
Melvin A. Rozema
James P. Scanlon
Robert P. Scheinblum
N.E. Schulze
Kenneth Shackelford
John M. Sharp
Kerin L. Shaughnessey
Robert K. Shepherd
Gary D. Simmons
David F. Smith
Robert W. Spielman
James Sorley
Dale A. Sticka
Murray V. Stookey
Larry J. Taylor
John S. Thompson
Donald L. Thorn
Richard Tichacek
James A. Tidwell
Michael H. Uhlenhop
Edwin D. Uselmann
Ernesto E. Valadez
John M. Valenzuela
Denis F. Waldron
Michael J. Walton
Robert W. Warner
George B. Waterman
Neal C. Watshon
R. Taft Weaver
M.G. Wilson
Howard C. Wolf, Jr.
Michael N. Wood
H.S. Wright, III
Edward J. Wucik
Warren B. Young
Robert V. Ziminsky

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. ———

AIR LINE PILOTS ASSOCIATION,
Petitioner,

v.

ROBERT A. MILLER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner Air Line Pilots Association respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is officially reported at 108 F.3d 1415, and is reprinted in the separately bound appendix to the petition (App.) at page 1a. The United States District Court for the District of Columbia issued three separate opinions plus an order denying a motion to amend or alter the judgment, none of which is officially reported. They are reproduced, respectively, at App. 21a,

44a, 62a and 41a. The Amended Opinion and Award [1] of Arbitrator Louis Aronin, whose findings of fact were accepted by the district court, is reprinted at App. 71a. The arbitrator also issued a Supplemental Opinion and Award, which is reprinted at App. 158a.

JURISDICTION

The decision of the court of appeals was issued on March 14, 1997. A timely petition for rehearing and suggestion for rehearing *en banc* was denied by the court of appeals on June 9, 1997. (App. 162a, 164a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 2 Eleventh of the Railway Labor Act, 45 U.S.C. § 152 Eleventh, provides in pertinent part:

> Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—
>
> (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

[1] The Amended Opinion and Award was identical to the arbitrator's original Opinion and Award except for nonsubstantive typographical and editorial corrections.

STATEMENT OF THE CASE

Petitioner Air Line Pilots Association (ALPA) is a labor organization that represents the pilots employed by most U.S. commercial air carriers, including Delta Air Lines, Inc. In November 1991, ALPA and Delta negotiated several amendments to their existing collective bargaining agreement, including an "agency shop" provision. This provision requires all represented pilots who choose not to become or remain members of ALPA to pay a "service charge" to ALPA in an amount equal to ALPA's dues and certain assessments. ALPA has similar agreements with most other airlines with which it bargains.

Respondents, who are pilots employed by Delta, brought this action in December 1991 to enjoin implementation of the agency-shop agreement.[2] The jurisdiction of the district court was invoked on the basis of 28 U.S.C.

[2] The original complaint was filed by five pilots, only three of whom remain in the case as respondents before this Court. One of the original plaintiffs, Donald Pedrazzini, voluntarily withdrew from the case while it was still pending in the district court. Another, Bruce R. Booher, was dismissed by the district court because he was an ALPA member, and he ultimately withdrew from the appeal. The other respondents are 150 nonmember pilots (one

§§ 1331 and 1337, and 29 U.S.C. § 412. The original complaint alleged seven separate grounds on which respondents claimed the agreement was unlawful under federal statutory and constitutional law, and a subsequent amendment to the complaint added two more grounds. The district court, in three separate decisions (App. 21a, 44a, 62a), dismissed all of respondents' claims. Most of those claims were abandoned on appeal.

Only two of the claims raised in the complaint remain at issue: (1) the claim that ALPA does not properly calculate the percentage of its expenses that are germane to collective bargaining and therefore chargeable to objecting agency-fee payers under applicable decisions of this Court, and (2) the claim that ALPA's independent auditors, Price Waterhouse, did not properly audit ALPA's 1992 "Statement of Germane and Nongermane Expenses," which ALPA issues each year in compliance with the disclosure requirements imposed by this Court's decision in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986). The first, second, and fourth questions presented in this petition relate to the first of these claims; the third question relates to the second claim.

ALPA's Policies And Procedures Applicable To Agency Fees

ALPA has adopted written "Policies and Procedures Applicable to Agency Fees" designed to ensure that no nonmember's agency fees are used, over his objection, for any purpose not germane to collective bargaining. These Policies and Procedures:

(1) inform nonmembers how to notify ALPA if they have an objection to paying for nongermane activities;

(2) require ALPA to prepare and distribute each year to all nonmembers paying agency fees a "Statement of

---

of whom is now deceased and represented by his executor) who were permitted to intervene by the district court and who participated in the appeal.

Germane and Nongermane Expenses" (SGNE), audited by ALPA's independent auditors, disclosing "in reasonable detail, the year's expenditures, segregating those that were germane to collective bargaining from those that were not";

(3) provide that all agency-fee payers who submit a written objection will receive an appropriate dues reduction, rebate, or credit, based on the percentage of ALPA's expenses that the SGNE shows were used for purposes not germane to collective bargaining; and

(4) provide an arbitration procedure by which an objector may challenge ALPA's calculation of the dues reduction or rebate. The selection of the arbitrator, and the procedures of the arbitration, are governed by the American Arbitration Association Rules for Determination of Union Fees.

The Arbitration Proceeding In This Case

The first year that respondents were required to pay an agency fee pursuant to the Delta agency-shop agreement was 1992. The SGNE for that year was issued in 1993, after ALPA's 1992 books had been closed and audited, and while this lawsuit was already pending. It showed that 19 percent of ALPA's expenses in 1992 were not germane to collective bargaining. (App. 120a).

One hundred seventy-four pilots, including many (but not all) of the respondents, requested arbitration of the 1992 calculation as reflected in the SGNE. The arbitration hearing occurred over three days, during which both oral testimony and documentary evidence were presented. Respondents' counsel objected to the arbitration but entered a "conditional" appearance on behalf of all the plaintiffs in this case and participated actively in the proceeding, challenging ALPA's record-keeping and fee calculation on numerous grounds. After the close of the hearing, both sides submitted comprehensive written briefs.

The arbitrator upheld ALPA's computation of germane and nongermane expenses for 1992 in all but four respects. He directed ALPA to reallocate expenses attributable to those four items from germane to nongermane, and ALPA did so. The reallocations resulted in an increase in the nongermane percentage for 1992 from 19 to 20.49 percent. The arbitrator approved this recalculation in his Supplemental Opinion and Award. (App. 158a-161a).

With respect to issues relevant to this petition, the arbitrator ruled as follows. First, despite the "conditional" appearance of plaintiffs' counsel, only those pilots who had submitted timely requests for arbitration prior to the hearing were entitled to be parties to the arbitration proceeding. (App. 73a-75a). Second, ALPA's expenditures to promote air safety are germane to collective bargaining, and are not ideological in character. They are therefore properly chargeable to agency-fee objectors. (App. 96a-108a).

The Decisions Of The District Court

As noted above, the district court issued three separate decisions concerning the merits of this case. Its first decision, issued on August 2, 1993, granted ALPA's motion for summary judgment with respect to most of respondents' claims but denied the motion with respect to others, including the claim that ALPA improperly charged agency-fee payers for costs that were not germane to collective bargaining. (App. 62a-70a). The denial was "without prejudice to renewal following further proceedings, including the additional round of discovery." (App. 70a). In separate orders issued on the same date, the court (a) allowed respondents to amend their complaint by adding, *inter alia*, the claim that ALPA's SGNE was not properly audited, and (b) granted respondents' motion to reopen discovery.

The second decision was issued on April 28, 1995, after the new round of discovery had closed and ALPA had

renewed its motion for summary judgment with respect to the remaining claims. In that decision, the court disposed of the claim that the SGNE had not been properly audited. The court found that the "Report of Independent Auditors" signed by Price Waterhouse, which accompanied the SGNE, established that the SGNE had been audited, and concluded that this was sufficient to satisfy the *Hudson* requirement of "verification by an independent auditor." (App. 51a-52a). However, with respect to plaintiffs' claim that ALPA did not properly calculate its germane and nongermane expenses in its 1992 SGNE, the court requested further briefing concerning what deference, if any, the court should give to the decision of the arbitrator and what effect, if any, the arbitration decision should have on those plaintiffs who were not parties to it. (App. 58a-59a).

The third decision was issued on August 30, 1995, after the requested briefing. The court held that nonunion employees who wish to challenge the calculation of their agency fees must exhaust the "impartial decisionmaker" procedure mandated by *Hudson*. Therefore, those of the plaintiffs who were not parties to the arbitration could not pursue their claims in court. (App. 27a-32a). The court further held that the proper standard of review of the arbitration decision would be to "defer to the findings of fact of the arbitrator unless those findings are clearly erroneous," but to "review *de novo* the arbitrator's legal conclusions." (App. 22a). In justifying these conclusions, the court stated:

> The Court concludes that the requirement of exhaustion of arbitral remedies and the standard of review set forth above give effect to the procedures established by the Supreme Court in *Hudson* and prevent the situation whereby unions subject to the RLA would have to defend their agency shop fee calculations in two separate trials every year—both in an arbitration proceeding and in a lawsuit brought by

> nonmembers who elect not to participate in the arbitration.

(App. 31a-32a).

The court then reviewed the arbitrator's decision according to the standard it had adopted and upheld that decision in all respects. (App. 32a-39a). With respect to the one substantive issue that is pertinent here, the germaneness of ALPA's air safety activities, the court stated:

> Plaintiffs allege that ALPA should have treated all costs related to air safety activities as nongermane to collective bargaining. Their main argument with respect to air safety is that, because ALPA's safety activities involve contacts with the FAA and other government entities, charging nonmembers for such activities is impermissible. . . . The record shows that ALPA's role in air safety includes accident investigation, the representation of pilots in grievances before the FAA, involvement in local and regional air safety committees, and other activities designed to promote safety. . . . ALPA's collective bargaining agreement with the Delta pilots includes safety-related provisions.
>
> Because the air safety costs are not directly related to ALPA's representational duties, the Court must apply the standards set forth in *Lehnert* [*v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991)] to determine if those costs are properly chargeable to the union nonmembers. The Court concludes as a matter of law that ALPA has met its burden of proving that the air safety costs have been properly allocated as germane expenses. Such expenditures are germane to collective-bargaining activity because they are a subject of the collective bargaining agreement. Safety expenditures are justified by the government's vital policy interest in labor peace and avoiding "free riders." Finally, safety expenditures do not significantly add to the burdening of free speech. *See Lehnert*, 500 U.S. at 519. The air safety expenditures are not being used for a political purpose simply because ALPA has some dealings with the federal government. The Court can find no constitutional grounds by which a nonmember could object to being charged for safety costs.

(App. 37a-39a).

The Court Of Appeals Decision

The court of appeals reversed the district court on three grounds. First, it held that respondents were not required to exhaust the arbitration procedure, because they had never agreed to arbitration. Second, it held that, as a matter of law, any expenses incurred by ALPA in connection with advocacy before government entities on issues relating to air safety cannot be charged to agency-fee objectors. Third, it held that the respondents were entitled to a trial on their claim that Price Waterhouse had not conducted a proper audit of the SGNE.

With respect to the exhaustion issue, the court noted that "[t]he circuits are split as to whether a union, obliged by federal law to offer *Hudson*-style arbitration to nonmembers challenging the amount of agency fees that they are charged, is entitled to insist on 'exhaustion' before the dissident employees come to federal court." (App. 10a). The court also acknowledged that Justice White's concurring opinion in *Hudson* had expressed the view that exhaustion was required. The court concluded, however, that there was "no *legal* basis for forcing into arbitration a party who never agreed to put his dispute over federal law to such a process. Nor is there anything in the *Hudson* majority opinion that even suggests that the Court thought it was putting protesting agency shop employees in that position." (App. 11a, emphasis in original; footnote omitted).

With respect to ALPA's advocacy on safety issues, the court considered such activity to be "political" in nature and therefore precisely the kind of activity that dissenters

cannot be required to support. The fact that safety is a matter within the scope of collective bargaining, the court said, "hardly renders the union's government relations expenditures germane." (App. 14a). Although this Court had recognized, in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519-20 (1991), that for unions in the public sector certain kinds of lobbying are an integral part of the collective-bargaining process, the court of appeals concluded that "extension of the *Lehnert* exception" to the present situation "would swallow the *Lehnert* rule." (App. 15a).

With respect to the audit issue, the court held that "[t]he professional adequacy of the *Hudson* audit is certainly a proper subject for review by a judge or an arbitrator." (App. 17a-18a). Therefore, various criticisms leveled at the Price Waterhouse audit by an accountant retained by the respondents raised a factual dispute that would have to be tried by the district court. (App. 18a-19a).

REASONS FOR GRANTING THE WRIT

A series of decisions of this Court has imposed on unions both substantive [3] and procedural [4] obligations to

[3] *See International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961); *Brotherhood of Ry. Clerks v. Allen*, 373 U.S. 113 (1963); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435 (1984); *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991).

[4] *See Chicago Teachers Union, Local No. 1 v. Hudson*, *supra*. Because the *Hudson* case involved public employees, the Court's decision was based on the First Amendment rather than any federal statute. However, as the court below pointed out (App. 8a), agency shop agreements negotiated under the Railway Labor Act have been held to be subject to the same constitutional restrictions as those in the public sector. *See Lancaster v. Air Line Pilots Ass'n*, 76 F.3d 1509, 1519-20 (10th Cir. 1996). Moreover, the court below held that the same procedural requirements imposed on public employee unions by the First Amendment would apply to

nonmembers who are subject to agency-fee agreements. These rules have been developed by the Court based on its interpretation of the underlying purposes of the applicable labor statutes and/or the implied imperatives of the First Amendment. While the Court's decisions in this area are clear as to some matters, other issues are unresolved, causing confusion, conflict, and unnecessary litigation in the lower federal courts. This case presents several such issues, and the protracted litigation that those issues have spawned in this and other cases demonstrates the need for further clarification by this Court.

I.

One issue, in particular, is a subject of squarely conflicting decisions among the Circuits. That is the issue of whether the "impartial decisionmaker" procedure mandated by the *Hudson* decision must be exhausted before a union's agency-fee determination can be challenged in court.

Among the procedural safeguards imposed by *Hudson* is a requirement that a union with an agency-shop agreement must provide a mechanism by which nonmembers may present any objection concerning the calculation of their agency fee to "an impartial decisionmaker." 475 U.S. at 307. The majority in that case did not address the question of whether an objector must exhaust that procedure before bringing suit in court. The issue was mentioned only in the concurring opinion of Justice White, joined by Chief Justice Burger, which stated: "if the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts." *Id.* at 311.

As a result of the silence of the main opinion in *Hudson*, the lower courts "have had no small difficulty untying the

unions in the private sector under the statutory duty of fair representation. (App. 9a-10a).

Gordian knot binding the judicial and nonjudicial procedures" for resolving agency-fee disputes. *Lancaster v. Air Line Pilots Ass'n*, 76 F.3d 1509, 1521 (10th Cir. 1996). Two Circuits, the Seventh and Tenth, have held that exhaustion is required. The Seventh Circuit, considering the issue in the *Hudson* case itself after the remand from this Court, reasoned as follows:

> Were we to accept plaintiffs' invitation and provide a hearing and judicial determination of the correctness of the fee, we would in effect render redundant and irrelevant the requirements that an impartial decisionmaker hear the dispute and that an escrow account be provided for the amounts reasonably in dispute while the challenge is pending. The proper procedure employs each of the prerequisites identified by the Supreme Court: the fair share notice provides the basis for a challenge to the fair share fee assessment; the impartial decisionmaker determines the correctness of the fee amount; and the escrow protects the challenger's funds pending such a decision. . . . Of course, the impartial decisionmaker's determination is not the final word on the challenge. *If* the decision is adverse to the plaintiffs, they may *subsequently* seek review by a federal court.

Hudson v. Chicago Teachers Union, Local No. 1, 922 F.2d 1306, 1314 (7th Cir.), *cert. denied*, 501 U.S. 1230 (1991) (emphasis in original). *Accord: Crosetto v. Heffernan*, 810 F. Supp. 966, 982 (N.D. Ill. 1992), *aff'd in part, vacated in part on other grounds sub nom. Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396 (7th Cir. 1993), *cert. denied*, 511 U.S. 1129 (1994). The Tenth Circuit agreed, pointing out that, unless exhaustion was required, the impartial-decisionmaker requirement would be " 'largely a waste of time and money,' "[5] and "we would more often be forced to micromanage the fee calculation

[5] Quoting *Bromley v. Michigan Educ. Ass'n*, 843 F. Supp. 1147, 1153 (E.D. Mich. 1994), *rev'd*, 82 F.3d 686 (6th Cir. 1996), *cert. denied*, —— U.S. ——, 117 S. Ct. 682 (1997).

in every case challenging a union assessment." *Lancaster v. Air Line Pilots Ass'n*, 76 F.3d at 1522.

The District of Columbia Circuit in this case has held directly to the contrary:

> Although we recognize that Justice White raised a legitimate *practical* concern directed at the quasi-legislative scheme that the majority adopted in *Hudson*, we simply see no *legal* basis for forcing into arbitration a party who never agreed to put his dispute over federal law to such a process. Nor is there anything in the *Hudson* majority opinion that even suggests that the Court thought it was putting protesting agency shop employees in that position.

(App. 11a, emphasis in original; footnote omitted). *See also Bromley v. Michigan Educ. Ass'n*, 82 F.3d 686, 691-95 (6th Cir. 1996), *cert. denied*, —— U.S. ——, 117 S. Ct. 682 (1997) (exhaustion cannot be required); *Hohe v. Casey*, 956 F.2d 399, 406-09 (3d Cir. 1992) (exhaustion cannot be required as to "constitutional" issues); *Kidwell v. Transportation Communications Int'l Union*, 946 F.2d 283, 303 (4th Cir. 1991), *cert. denied*, 503 U.S. 1005 (1992) (noting circuit conflict without deciding the issue).

This conflict urgently requires resolution by this Court. As a result of the *Hudson* decision, virtually every union in the country has adopted an arbitration procedure for resolving agency-fee disputes. Most unions, like ALPA, use the services of the American Arbitration Association, which has adopted "Rules for Impartial Determination of Union Fees" for this specific purpose. In many unions, including ALPA, disputes concerning the calculation of agency fees recur every year, because a new calculation must be made each year based on that year's activities and expenses. Thus, the exhaustion question will arise again and again until it is finally resolved by this Court. This case presents the perfect opportunity to resolve it.

II.

A corollary issue presented by this case is the degree of deference, if any, that a court should give the decision of a *Hudson*-mandated impartial decisionmaker in an agency-fee dispute. This issue, also, was left unresolved by this Court's decision in *Hudson*. The Court did say that "[t]he arbitrator's decision would not receive preclusive effect in any subsequent § 1983 action," 475 U.S. at 308 n.21, but it gave no hint as to whether any deference short of "preclusive effect" would be appropriate.

The district court in the present case analogized the role of the impartial decisionmaker required under *Hudson* to that of a court-appointed master under Fed. R. Civ. P. 53, whose findings of fact must be accepted by the court "unless clearly erroneous." Rule 53(e)(2). All legal issues, on the other hand, remain subject to determination *de novo*. (App. 22a, 31a). The court expressed the view that applying this standard of review here would

> give effect to the procedures established by the Supreme Court in *Hudson* and prevent the situation whereby unions subject to the RLA would have to defend their agency shop fee calculations in two separate trials every year—both in an arbitration proceeding and in a lawsuit brought by nonmembers who elect not to participate in the arbitration.

(App. 31a-32a). Another district court relied on similar reasoning in adopting a deferential standard of review, but its decision was reversed on appeal. *See Bromley v. Michigan Educ. Ass'n*, 843 F. Supp. 1147, 1153-54 (E.D. Mich. 1994), *rev'd*, 82 F.3d 686 (6th Cir. 1996), *cert. denied*, —— U.S. ——, 117 S. Ct. 682 (1997).

The court of appeals in the present case, having decided the exhaustion issue in favor of respondents, found it unnecessary to decide the standard of review issue. Because the court found that respondents had submitted to arbitration only "under protest" and were not required to do so at all, it concluded that "the parties' dispute as

to the scope of review of the arbitrator's decision is beside the point." (App. 4a). Nevertheless, this Court should grant review of both questions. If the Court disagrees with the court of appeals on the issue of exhaustion, the question of what standard of review applies would have to be decided. Moreover, the latter question is independently important, and will continue to recur and cause confusion and needless litigation until it is finally resolved by this Court.

III.

The third issue presented by this case is whether the auditing procedures used by an independent accounting firm in "verifying" the agency-fee disclosure statement required by *Hudson* are subject to judicial challenge and review. *Hudson* held that potential agency-fee objectors must be given "sufficient information to gauge the propriety of the union's fee." 475 U.S. at 306. The Court further explained: "The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, *as well as verification by an independent auditor*." *Id.* at 307 n.18 (emphasis added).

The *Hudson* opinion gave no further indication of what the Court precisely meant by the phrase "verification by an independent auditor," and the issue has spawned extensive litigation in the federal courts.[6]

---

[6] *See Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335, 340 (2d Cir. 1987); *Ping v. National Educ. Ass'n*, 870 F.2d 1369, 1374 (7th Cir. 1989); *Gwirtz v. Ohio Educ. Ass'n*, 887 F.2d 678 (6th Cir. 1989), *cert. denied*, 494 U.S. 1080 (1990); *Dashiell v. Montgomery Cty., Md.*, 925 F.2d 750, 754-57 (4th Cir. 1991); *Hohe v. Casey*, 727 F. Supp. 163, 165-67 (M.D. Pa. 1989), *aff'd in part, rev'd on other grounds*, 956 F.2d 399 (3d Cir. 1992); *Mitchell v. Los Angeles Unified School Dist.*, 739 F. Supp. 511, 514-16 (C.D. Cal. 1990); *Prescott v. County of El Dorado*, 915 F. Supp. 1080, 1089-90 (E.D. Cal. 1996).

In this case, ALPA's 1992 SGNE was accompanied by a "Report of Independent Accountants," signed by Price Waterhouse. (App. 118a-119a). The Report certified that "[w]e have audited the accompanying statement of germane and nongermane expenses of Air Line Pilots Association for the year ended December 31, 1992," and went on to describe the audit and its result:

> We conducted our audit in accordance with generally accepted auditing standards which require that we plan and perform the audit to obtain reasonable assurance about whether this statement is free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements assessing the accounting principles used and significant estimates made by management and evaluating the overall financial statement presentation. We believe that our audit provides a reasonable basis for the opinion expressed below.
>
> * * * *
>
> In our opinion, the aforementioned statements present fairly, in all material respects, the germane and nongermane expenses of the Air Line Pilots Association for the year ended December 31, 1992, based on the definitions, significant factors, and management assumptions referred to above.

(App. 118a-119a).

The district court held that this certification, in itself, satisfied the "verification" requirement. (App. 51a-52a). Respondents, however, contended that Price Waterhouse's auditing procedures were inadequate, and the court of appeals held that they are entitled to a trial of this issue:

> The professional adequacy of the *Hudson* audit is certainly a proper subject for review by a judge or an arbitrator. ALPA would have us hold that, in the absence of allegations of fraud or willful misconduct, a court or arbitration panel should not inquire whether the *Hudson* audit was properly performed.

> Although *Hudson* does not require that every underlying record and document be discoverable by objecting members' accounting experts, as [plaintiffs' accountant] suggests, we disagree that the methodology of the auditor may not be questioned for anything but fraud or intentional deception. *Hudson* did not stand for the proposition that a rubber stamp by an accountant stating "this was audited" meets the constitutional minimum it envisioned.

(App. 17a-18a).

The court of appeals' ruling would require a trial not merely of the correctness of the data contained in the SGNE, but also the adequacy of the procedures used by Price Waterhouse in performing its audit of the SGNE. At such a trial, both sides would present expert accounting testimony concerning the relevant standards and practices of the accounting profession. The trial court would then have to choose between the conflicting accountants' opinions, with no guidance other than this Court's statement that the SGNE must be "verifi[ed] by an independent auditor." *Hudson*, 475 U.S. at 307 n.18.

We doubt that the *Hudson* Court intended to place the federal courts in the position of mediating this kind of dispute between accountants. But whether we are correct or not, the matter should be clarified by this Court. Given the frequency of litigation concerning agency fees, the lower courts should not be required to speculate about what the Court truly meant by the verification requirement.

IV.

The fourth and final issue in this case is whether union advocacy before government agencies on matters that directly impact the working conditions of employees the union represents should be considered "germane to collective bargaining" and therefore appropriately chargeable to agency-fee objectors, or whether, as the court of appeals held, such activities are "political" in nature and therefore not chargeable.

The issue arises in this case with respect to ALPA's activities in the field of air safety. The promotion of air safety is a major ALPA goal, and one that ALPA pursues in a wide variety of ways. ALPA negotiates provisions in its collective bargaining agreements relating to air safety; maintains a safety committee at each airline to monitor airline operations and work with management on safety issues and problems as they arise; participates in airline accident investigations conducted by the National Transportation Safety Board; conducts ongoing studies in a wide range of technical areas relating to air safety and publishes the results of such studies to the pilots and the industry; works with aircraft manufacturers to promote air safety in the design of new aircraft or improvements in existing aircraft; participates in rulemaking and other administrative proceedings before government agencies on matters affecting air safety; and works informally with government regulators on safety-related issues.

The object of all of ALPA's safety-related activities is to protect and enhance the on-the-job safety of the pilots it represents. ALPA pursues this goal both with the airlines and with the government because the pilot's working life and environment are controlled by both. For example, government regulations determine:

—the maximum number of hours a commercial pilot may be scheduled to fly during any day, week, month, and year, and the minimum amount of rest he must have between flight assignments (14 C.F.R. § 121.470 *et seq.*);

—the specific medical standards that commercial pilots must meet, and the nature and frequency of the medical testing they must undergo (*id.* § 67.1 *et seq.*);

—the qualifications a pilot must meet to be certified to fly each particular aircraft type (*id.* § 61.61 *et seq.*);

—the frequency and nature of the in-flight proficiency tests a pilot must pass, including the specific maneuvers he must perform (*id.* §§ 61.57-61.58);

—the age at which a commercial pilot must retire (*id.* § 121.383(c));

—detailed rules of flight operation, such as minimum altitudes and speeds, rights of way, communications with air traffic control, and many other matters relating to the performance of a pilot's flight duties (*id.* § 91.101 *et seq.*).

These are all matters which, in the absence of regulation, would be subject to normal collective bargaining. As they are actually determined in large measure by government regulation, the only way ALPA can effectively represent the pilots' interests with respect to such matters is to advocate those interests both to the appropriate agencies of government and to the airlines themselves. The airlines forcefully present their views to the government, and if ALPA did not do the same the pilots would have no effective voice in these matters.

To the extent that ALPA negotiates directly with the airlines on matters relating to safety, no one disputes that the costs can be charged to agency-fee payers. The court of appeals held, however, that when ALPA pursues the same safety goals through advocacy before government agencies, it is engaging in "lobbying" and the costs cannot be charged to agency-fee objectors:

> That the subject of safety is taken up in collective bargaining hardly renders the union's government relations expenditures germane. Under that reasoning, union lobbying for increased minimum wage laws or heightened government regulation of pensions would also be germane. Indeed, if the union's argument were played out, virtually all of its political activities could be connected to collective bargaining; but the federal courts, including the Supreme Court, have been particularly chary of treating as germane union expenditures that touch the political world.

(App. 14a-15a).

This holding is in conflict with the approach taken by this Court in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), in which the issue was the chargeability of lobbying activities by a union representing public teachers. Although the Court concluded that the particular lobbying activities at issue in that case were not sufficiently related to collective bargaining, it acknowledged that some lobbying activities by a union representing public employees would be chargeable to agency-fee objectors:

> The Court of Appeals determined that unions constitutionally may subsidize lobbying and other political activities with dissenters' fees so long as those activities are " 'pertinent to the duties of the union as a bargaining representative.' " . . . In reaching this conclusion, the court relied upon the inherently political nature of salary and other workplace decisions in public employment. "To represent their members effectively," the court concluded, "public sector unions must necessarily concern themselves not only with negotiations at the bargaining table but also with advancing their members' interests in legislative and other 'political' arenas." . . .
>
> This observation is clearly correct. Public-sector unions often expend considerable resources in securing ratification of negotiated agreements by the proper state or local legislative body. . . . Similarly, union efforts to acquire appropriations for approved collective-bargaining agreements often serve as an indispensable prerequisite to their implementation. . . . The dual roles of government as employer and policymaker in such cases make the analogy between lobbying and collective bargaining in the public sector a close one.

Id. at 519-20 (citations omitted).

Admittedly, *Lehnert* involved public employees, whose lobbying acivities would be aimed directly at the public agency that controls their wages and working conditions. But airline pilots, although privately employed, are in

essentially the same relationship to the government when it comes to matters of air safety. From the moment a pilot reports for duty to the moment he is released, his entire working environment and his every action on the job are determined by two sets of interrelated and interdependent rules—those promulgated by the employer and those promulgated by the government.

The court of appeals argued that if ALPA's "lobbying" on safety issues were to be treated as germane to collective bargaining, "the *Lehnert* exception would swallow the *Lehnert* rule." (App. 15a). We respectfully disagree. Many political activities commonly pursued by unions—for example, supporting candidates for public office or promoting general legislation dealing with such issues as medicare, social security, welfare, foreign trade, and the like—are far removed from collective bargaining, and therefore are covered by the rule, not the exception. There is a bright line between such general political activities, on the one hand, and, on the other, advocacy that concerns matters that directly impact the working conditions of employees that a union represents. When this Court has ruled, in prior cases, that costs associated with "political" activities and "lobbying" cannot be charged to agency-fee objectors, it was dealing with the former type of activity, not the latter. *See International Ass'n of Machinists v. Street*, 367 U.S. 740, 744 (1961) (funds used "to finance the campaigns of candidates for federal and state offices . . . and to promote the propagation of political and economic doctrines, concepts and ideologies"); *Brotherhood of Ry. Clerks v. Allen*, 373 U.S. 113, 117 (1963) (funds used for political and legislative purposes "not reasonably necessary or related to collective bargaining"). Just last term, the Court characterized this line of cases as holding that "compelled contributions for political purposes *unrelated to collective bargaining* implicated First Amendment interests . . . ." *Glickman v. Wileman Bros. & Elliott, Inc.*, —— U.S. ——, 117 S. Ct. 2130, 2139 (1997) (emphasis added).

It is possible, as the court of appeals pointed out, that not all pilots will necessarily always agree with ALPA's position or tactics with respect to specific regulatory matters relating to air safety—although respondents in this case have never expressed any specific disagreement. A union is not restricted to those actions that are unanimously supported by its constituents: "The complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

> The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy.

Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222-23 (1977) (quoting *International Ass'n of Machinists v. Street*, 367 U.S. 745, 778 (1961) (concurring opinion)).

In short, we believe the court below misconstrued and misapplied the applicable decisions of this Court in determining that ALPA's advocacy before government agencies concerning issues relating to air safety was not chargeable to agency-fee objectors. At the very least, there is an urgent need for clarification by this Court of the criteria for determining when a union's advocacy before government entities is sufficiently related to its collective bargaining function to be considered "germane to collective bargaining."

CONCLUSION

For the reasons stated, the writ of certiorari should be granted.

Respectfully submitted,

JERRY D. ANKER
(Counsel of Record)
CLAY WARNER
Air Line Pilots Association
Legal Department
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 797-4087